IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JAIPUR BENCH, JAIPUR.

J U D G M E N T

M/s. B.S.Industries & Oil Mills Vs. M/s.Vijay Power Generators Limited.

S.B.CIVIL FIRST APPEAL NO. 824/2005
AGAINST THE ORDER DATED 30.9.2005
PASSED BY ADDL. DISTT. & SESSIONS
JUDGE (FAST TRACK) NO.5, BHARATPUR
IN CIVIL SUIT NO.20/2005.

Date of Order ** February 2nd, 2007

PRESENT
HON'BLE DR. JUSTICE VINEET KOTHARI

Mr. Bipin Gupta, for the petitioner.
Mr. M.M.Ranjan, for the respondents.

BY THE COURT:

1. This appeal has been filed challenging the impugned order of learned trial court allowing the application under O.7 R.11 CPC and dismissing the suit at the threshold on the ground of the suit being barred by limitation.

2. Making the submissions for the appellant, Mr.Gupta, learned counsel appearing for the appellant submitted that the issue relating to limitation is a mixed question of fact and law and, therefore, unless the issues were framed and evidence was taken, the suit could not be held to be barred by limitation and, therefore, the learned

trial court has erred in rejecting the suit by the impugned order.

3. The suit was filed by the plaintiff-appellant with regard to the supply of a Diesel Generating Set by the defendants to the plaintiff against which the plaintiff gave certain cheques and also applied for loan to the Rajasthan Financial Corporation. There were disputes between the parties and not only this but the jurisdiction of the Consumer Forum was also invoked by the appellant and a criminal complaint for dishonor of cheques under Sec.138 of the Negotiable Instrument Act was filed by the defendant in Delhi. In view of all these facts, it appears that there are disputes between the parties of civil nature relating to supply of Diesel Generating Set which are very much alive even now.

4. Learned counsel for the appellant relying upon the following judgments submitted that there was a continuous cause of action to the plaintiff and, therefore, it is not that the plaintiff had approached the trial court after waiting for the period of limitation to expire and in fact the suit was not barred by limitation.

(i) **2005(7) SCC 510** (Popat and Kotecha Property Vs. State Bank of India Staff Association)

(ii)**2006(5) SCC 658** (Balasaria Construction (P) Ltd. Vs. Hanuman Seva Trust and ors.)

(iii)**1999(2) WLC(Raj.) 110** (Mohan Lal Sukhadia University, Udaipur Vs. Miss Priya Soloman)

The sum and substance of ratio of these judgments is that the limitation being a mixed question of fact and law, the trial court could not have refused to go into that issue after taking evidence on record.

4. This submission is opposed by Mr.Ranjan, learned counsel appearing for the respondent who submitted that where the plaint itself discloses the cause of action to have arrived prior to period of three years, the trial court was justified in rejecting the suit as time barred.

5. Having considered the rival submissions and cited case laws, this court is of the opinion that the trial court has erred in rejecting the suit at the threshold by allowing the application under O.7 R.11 CPC. In view of civil nature of dispute between the parties and protracted litigation going on at different forums, in the opinion of this court, suit could not have been thrown out on the ground of limitation and it definitely depended upon the facts occurring on different dates upto the filing of the present suit.

7. Accordingly, the present appeal is allowed, the impugned order is set aside and the trial court is directed to decide the suit afresh on merits in accordance with law after framing the relevant issues. No order as to costs.

(Dr.VINEET KOTHARI),J.

Srawat/-